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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 640.

GARTLAND STEAMSHIP COMPANY,
Petitioner,

—against—

INTERLAKE IRON CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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INDEX.

PAGE

Introduction 1

Argument 1

POINT I—Petitioner is liable to respondent on the facts found concurrently by the courts below... 1

POINT II—Petitioner is not entitled to limit its liability under the provisions of 46 U. S. C. ¶183 as petitioner breached its personal contract ... 5

Conclusion 6

TABLE OF CASES:

Caledonia, The, 157 U. S. 124, 130, 131 3

Edwin I. Morrison, The, 153 U. S. 199, 210 3

Isis, The, 290 U. S. 333, 345 3

Johnson v. *Kosmos Portland Cement Co.,* 64 F. (2d) 193 (C. C. A. 6), cert. denied, 290 U. S. 641 4

Norris Grain Co. v. *Great Lakes Transit Corp.,* 70 F. (2d) 32 (C. C. A. 7), cert. denied 293 U. S. 565... 4

STATUTE:

46 U. S. Code, ¶183 5

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The Circuit Court of Appeals for the Sixth Circuit found that the loss of respondent's cargo and the expenses which respondent necessarily incurred, proximately resulted from the unseaworthiness of petitioner's vessel, the S. S. "Burlington", existing as the result of petitioner's lack of due diligence (R. 497). Petitioner would have this Court reverse that finding.

ARGUMENT.

POINT I.

Petitioner is liable to respondent on the facts found concurrently by the courts below.

The Circuit Court of Appeals and the District Court (for the Western District of Michigan) made the following findings concurrently:

1. Petitioner contracted with respondent to

carry respondent's cargo from Toledo, Ohio, to the Harrington Coal Dock at Holland, Mich., on the S. S. "Burlington", during the month of December, 1936 (D. C., R. 469; C. C. A., R. 494).

2. To reach Holland it is necessary for a vessel to sail from Lake Michigan between two breakwaters, thence through a stilling basin, thence between two inner piers to Lake Macatawa, and thence for a distance of six miles through a dredged channel in that lake to the dock (D. C., R. 469-70; C. C. A., R. 494-5).

3. After completion of dredging operations on June 6, 1936, at low water datum level (578.5 feet above mean low water at New York), there was 19 feet of water in the channel between the inner piers and 18 feet in the six-mile long channel in Lake Macatawa (D. C., R. 472; C. C. A., R. 495).

4. The water level of Lake Michigan varies seasonally with the lowest level during the winter. The average level of Lake Michigan for the Decembers of 1932 to 1935 inclusive was about 8½ inches below low water datum level (D. C., R. 472, 474; C. C. A., R. 495, 496).

5. After deducting 8½ inches as the expectable diminution of the water level from low water datum level, but without giving consideration to shoaling between June and December or to the direction and velocity of the wind, the depths expectable in December, 1936, were 18 feet 3½ inches in the channel between the inner piers and 17 feet 3½ inches in the six-mile long channel in Lake Macatawa (D. C., R. 472, 474; C. C. A., R. 495, 496, 497).

6. When the "Burlington" sailed from Toledo she drew 17 feet forward and 18 feet 4 inches aft.

It was then to be expected that consumption of coal and water during the voyage would reduce her drafts so that upon arrival off Holland she would draw 17 feet 3 inches forward and 17 feet 6.1 inches aft (D. C., R. 469; C. C. A., R. 494).

7. Neither the petitioner nor the master made any inquiry, before the vessel broke ground at Toledo, concerning the water levels existing at Holland and, after sailing, the master could not ascertain the actual depths prevailing there because the vessel was not equipped with radio (D. C., R. 474; C. C. A., R. 496).

As it is obvious that a vessel drawing 17 feet 6 inches aft could not navigate for six miles in a channel where there is something less than 17 feet 3½ inches of water, the Circuit Court of Appeals held that when the "Burlington" sailed from Toledo she was unseaworthy for the voyage which petitioner had contracted to make (R. 497). As all of the data relating to expectable conditions at Holland was contained in official governmental publications available to anyone interested, that Court found that the petitioner had not exercised due diligence in permitting this vessel to sail from Toledo with the drafts she had (R. 497).

Petitioner was obligated to provide a seaworthy vessel for the voyage contracted for, *i. e.*, for a voyage from Toledo to the Harrington Coal Dock at Holland.

> *The Edwin I. Morrison,* 153 U. S. 199, 210;
> *The Caledonia,* 157 U. S. 124, 130, 131;
> *The Isis,* 290 U. S. 333, 345.

As the vessel was unseaworthy for the voyage contracted for because, when she sailed on that voyage, her drafts were such that she could not be expected safely to complete the voyage, and as the vessel

stranded where she did because "her draft * * * was too great for the depth of the water which she encountered" (D. C. Finding of Fact 11, R. 471), the Circuit Court of Appeals found that the stranding resulted from the vessel's unseaworthiness (R. 497, 499).

As we understand it, petitioner's argument is that the vessel would not have stranded where she did were it not that on the morning of the stranding the water level at Holland was abnormally depressed because of a phenomenon known as a "seiche" which was not foreseeable. It is urged, therefore, that the stranding resulted from a peril of navigation and was not proximately related to the vessel's unseaworthiness even though that unseaworthiness was bound to cause the vessel to strand, whether or not there was a seiche, a few hundred yards from the point where in fact she did strand.

The Circuit Court of Appeals applied the doctrine of *Johnson* v. *Kosmos Portland Cement Co.*, 64 F. (2d) 193, certiorari denied, 290 U. S. 641, holding (R. 498) that causal relation must be recognized—

> "whenever the thing done or omitted produces immediate danger of injury and is a substantial factor in bringing it about even though the precise result may not be foreseen. The test of proximity has been satisfied if a generally dangerous result was within the realm of expectability."

The Court pointed out that that principle is the rationale of *Norris Grain Co.* v. *Great Lakes Transit Corp.*, 70 F. (2d) 32 (C. C. A. 7), cert. denied, 293 U. S. 565.

Petitioner does not argue that there is any conflict between the circuits as to this principle; it would have

this Court overrule this established doctrine. We submit that the principle is salutary and logical and should not be disturbed.

POINT II.

Petitioner is not entitled to limit its liability under the provisions of 46 U. S. C. ¶183 as petitioner breached its personal contract.

Conceding the principle to be well established that if a vessel owner breaches a warranty of seaworthiness, whether expressed in its personal contract or implied in that contract by law, it is not entitled to limit its liability for damages flowing from that breach, under the provisions of 46 U. S. C. ¶183, petitioner argues that the contract of the parties in this case is contained in a bill of lading and that the provisions of that bill of lading reduce the absolute warranty of seaworthiness implied by law to an agreement to exercise due diligence to make the vessel seaworthy. We submit that it makes little difference whether petitioner's warranty concerning the seaworthiness of the "Burlington" was absolute or merely a warranty to use due diligence: the Circuit Court of Appeals has held that due diligence was not exercised.

Moreover, the language of the bill of lading on which petitioner relies as modifying the absolute implied warranty of seaworthiness (Petitioner's Brief, p. 11), relates only to defects in the hull and machinery of the vessel and in no way touches upon unseaworthiness resulting from overloading. The warranty of seaworthiness implied by law in this respect, therefore, remains absolute.

* * *

Conclusion.

As unseaworthiness of the "Burlington" existing by reason of petitioner's lack of due diligence was proximately related to the vessel's loss; as petitioner entered into a "personal" contract with respondent in which the law imputes a personal warranty of absolute seaworthiness; as the implied warranty of absolute seaworthiness so far as concerns the ship's drafts was not in any way modified by agreement of the parties; as, in any event, petitioner's agreement to exercise due diligence was breached, we submit that, on well recognized principles and as held by the Circuit Court of Appeals, petitioner is liable to respondent to the full extent of respondent's damages, without limitation.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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